

DOCKET FILE COPY ORIGINAL
Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

NOV 11 0 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of Section 309(j)
of the Communications Act)

Competitive Bidding)

PP Docket No. 93-253

TO: The Commission

COMMENTS OF ASSOCIATION OF AMERICAN RAILROADS

The Association of American Railroads ("AAR"), by its undersigned counsel, hereby submits these comments in the Notice of Proposed Rule Making in the above-captioned proceeding, released October 12, 1993 (hereinafter "Notice").

I. Background and Statement of Interest

The Commission is required by the Omnibus Budget Reconciliation Act of 1993^{1/} (the "Budget Act") to adopt regulations under which certain types of radio licenses will be awarded by means of competitive bidding. Specifically, the Budget Act requires that the Commission award radio licenses through competitive bidding when two or more mutually exclusive applicants seek an initial license that principally will be used to provide communications service to subscribers for compensation.

The railroad industry is an extensive user of the radio frequency spectrum. Railroads hold licenses in the Private Land

^{1/} Pub. L. No. 103-66, 107 Stat. 312 (1993).

No. of Copies rec'd
List ABCDE

CH

Mobile Radio Service (PLMRS) regulated under Part 90 of the Commission's rules, and in the Private Operational Fixed Service (POFS) regulated under Part 94 of the rules.

Mobile radio plays an essential role in railroad operations. The railroads' PLMRS facilities operate primarily on 91 channels in the 160 MHz range and on 10 channels in the 450-470 MHz range. Aboard locomotives and rail equipment, along railroad tracks and in stations, terminals and train yards across the nation, railroads utilize about 16,400 base stations, 45,000 mobile radios, 125,000 portable radios, 5,500 "talking" defect detectors, and 56,000 end-of-train, head-of-train devices and locomotive mobiles to ensure the safe and efficient operation of trains and equipment.

The railroads' POFS fixed point-to-point microwave facilities are equally essential. They are used to monitor and control more than 1.2 million freight cars on more than 215,000 miles of track, automatically relaying signal information and remotely controlling the switching of tracks necessary for the safe routing of trains through depots and freight yards. These POFS systems also relay critical telemetry data from trackside defect detectors located throughout the rail network, and are vital to coordination of operations among different railroads.

It is the AAR's position that, because of the shared nature of the frequencies on which they operate and because of the manner in which they are used, railroad radio systems, both mobile and fixed, are not among the types of systems for which licenses must be awarded by competitive bidding under the provisions of the Budget Act.

II. The Railroads Use Shared Spectrum For Internal Railroad Purposes of Support Safe and Efficient Operations

The railroad industry agrees with the Commission's proposal to exempt from the competitive bidding process applications for radio licenses which use shared spectrum and which will be employed principally for internal communications purposes rather than for providing services to subscribers for compensation.

A. Mutual Exclusivity Cannot Exist Where Channels are Shared by Numerous Licensees

By its terms, Section 309(j) of the Budget Act only permits competitive bidding for radio licenses if mutual exclusivity exists among applications that have been accepted for filing. Thus, if mutual exclusivity among such applications does not exist, the grant of a license cannot be subject to the competitive bidding procedures.

The radio licenses used by the railroad industry, both in the PLMRS and the POFS services, utilize frequencies that are shared by numerous licensees on a coordinated basis. The Commission has proposed that such frequencies will not be subject to competitive bidding because of the lack of exclusivity.^{2/} AAR agrees with the Commission's proposal.

B. Railroads Use Spectrum for Internal Operational Purposes

The second major criterion for competitive bidding set forth in Section 309(j) of the Budget Act is that the "principal use" of the spectrum must involve the receipt of compensation from

2/ Notice of Proposed Rulemaking at n. 3, n. 154 and n. 158; and at paragraphs 131-146.

subscribers in return for the licensee's provision of communication service to the subscribers.

As described above, the principal use of the railroad radio licenses in the PLMRS and POFS services is not for the provision of subscriber-based services. Rather, they are used principally to run the railroads and to support safer and more efficient railroad operations. The Commission has proposed to exclude such licenses from the competitive bidding requirement (Notice of Proposed Rulemaking at paragraphs 26, 146.^{3/}), and the railroad industry supports the Commission's proposal.

C. Majority or Average Use of a Class of Service Providers is the Appropriate Principal Use Test

In order for competitive bidding to apply, Section 309(j) of the Budget Act requires that the "principal use" of the spectrum involve the transmission of communication signals to subscribers for compensation. There are some services, such as the POFS service licensed under Part 94 of the rules, where licensees may use the frequencies both to provide communications service to themselves and to offer communications service to subscribers for

3/ With respect to PLMRS licenses, AAR notes that the Commission specifically proposed to exempt "PLMRS under 470 Mhz." Notice at paragraph 146 and n. 158. The rationale for specifying 470 Mhz was that entities operating below that frequency operate on shared spectrum and, therefore, there can be no mutual exclusivity among applications. Id. In this regard, AAR notes that there are six frequency pairs above 470 MHz (i.e., in the 900 MHz band) set aside for use by the railroad industry. Frequency Pairs for An Advanced Train Control System, 3 FCC Rcd 427 (1988). Even though these frequencies are above 470 MHz, they should nevertheless be deemed to be exempt from the competitive bidding requirements because that they are used for purposes of railroad operations and control, rather than for providing communication services to subscribers for compensation.

compensation. See, e.g., Section 94.17 of the rules which governs such "mixed use" for fixed point-to-point frequencies.

The Commission acknowledged in its Notice of Proposed Rulemaking the apparent Congressional recognition of such "mixed use" services by inclusion of the "principal use" criterion in Section 309(j). In order to determine what is the appropriate "principal use" of a given service or class of service, the Commission discussed two possible approaches.^{4/} The first approach, and the one proposed for adoption by the Commission, is that at least a majority of the use of a service or class of service must be for service to subscribers for compensation, rather than for "private service," in order for competitive bidding to be used. Stated another way, if the principal use of a service or class, either by average users or by the majority of users within a service, is for "private service" (i.e., services without paying subscribers), then the entire service or class of service would be exempted from competitive bidding. Id. at paragraph 32.

The alternative approach discussed by the Commission is that if there is any use, no matter how minimal, in which one or more licensees within a given service or class of service uses the spectrum for the provision of service to subscribers for compensation, then the entire class of service would be subject to competitive bidding. According to the Commission, this approach might be "administratively convenient," but also could lead to inequities. Moreover, the Commission acknowledged that

4/ Notice of Proposed Rulemaking at paragraphs 30-33.

this approach could produce results that are inconsistent with the Congressional intent that a particular service, in order to be subject to competitive bidding, must be used "principally" for subscriber services. Id. at paragraph 33.

AAR urges the Commission to adopt the first approach for determining the "principal use" within a service or class of service. In the case of the railroads, the overwhelming majority of use of the fixed microwave point-to-point frequencies is for "private service," i.e., services without paying subscribers. Any use of these frequencies and facilities pursuant to Section 94.17 of the rules for the provision of services to subscribers is ancillary. AAR respectfully submits that exempting such services and classes of service from the competitive bidding requirement would be fully consistent with the intent of Congress with respect to the "principal use" criterion. Accordingly, AAR supports the Commission's proposal to exclude the POFS frequencies from competitive bidding.^{5/}

**D. Railroad Licensees That are "Forcibly"
Relocated from the 2 GHz Band Should Not
be Subject to Competitive Bidding**

The railroads support the Commission's tentative conclusion that entities which are "forcibly" relocated from the 2 GHz band by the Commission's orders in ET Docket No. 92-9, should be exempt from competitive bidding. Id. at paragraph 128, n. 118. The only conceivable reason that the railroads would fall under the Budget Act's criterion regarding "initial licenses" would be because they have been forced to change frequencies to

^{5/} Notice of Proposed Rulemaking at paragraph 32 and n. 16.

accommodate "emerging technologies" in the 2 GHz band. Under those circumstances, the licenses required for new frequencies would not properly be considered "initial licenses" within the meaning of the Budget Act, but should more appropriately be deemed replacement licenses. Furthermore, those "replacement" licenses should also be exempt from the competitive bidding requirement under the "principal use" criterion, as discussed above, insofar as their principal use is for "private service" rather than for providing service to paying subscribers.

III. Conclusion

The AAR supports the Commission's conclusion that railroad licenses in the Private Operational Fixed Service and Private Land Mobile Radio Services be exempt from competitive bidding because they utilize non-exclusive, shared frequencies and are used principally for internal operational purposes rather than for the provision of communications service to subscribers for compensation.

Respectfully submitted,

THE ASSOCIATION OF AMERICAN RAILROADS

By 
Thomas J. Keller
Michael S. Wroblewski

Verner, Liipfert, Bernhard,
McPherson and Hand, Chartered
901 15th Street, N.W., Suite 700
Washington, DC 20005
(202) 371-6000

Its Attorneys

November 10, 1993

CERTIFICATE OF SERVICE

I, Norma E. Rusnak, hereby certify that on this 10th day of November, 1993, a copy of the foregoing "Comments of Association of American Railroads" was served by first class United States mail, postage prepaid on the following parties:

Chairman James H. Quello
Federal Communications Commission
1919 M Street, NW -- Room 802
Washington, D.C. 20554

Commissioner Andrew D. Barrett
Federal Communications Commission
1919 M Street, NW -- Room 844
Washington, D.C. 20554

Commissioner Ervin S. Duggan
Federal Communications Commission
1919 M Street, NW -- Room 832
Washington, D.C. 20554

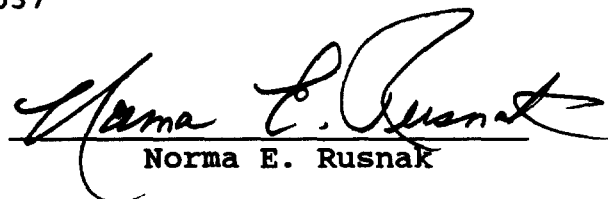
Ralph Haller
Chief, Private Radio Bureau
Federal Communications Commission
2025 M Street, NW -- Room 7002
Washington, D.C. 20554

Kathleen B. Levitz
Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW - Room 500
Washington, D.C. 20554

Robert M. Pepper
Chief, Plans & Policy Division
Federal Communications Commission
1919 M Street, NW -- Room 822
Washington, D.C. 20554

Toni L. Simmons
Office of Plans and Policy
Federal Communications Commission
1919 M Street, NW -- Room 822
Washington, D.C. 20554

International Transcription Service, Inc.
2100 M Street, NW
Suite 150
Washington, D.C. 20037


Norma E. Rusnak